

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation
of the

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

v.

SASCO ELECTRIC, a California Corporation,

Respondent.

ZIBUTE RADZIUTE SCHERL,

Complainant.

Case No.

E200405-D-1433-00-s

C 05-06-057

07-02-P

DECISION

The Fair Employment and Housing Commission, in a vote of 4:0, hereby adopts the attached Proposed Decision as the Commission's final decision in this matter. The Commission also votes 3:0, Commissioner Freeman abstaining, to designate the decision as precedential, pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, title 2, section 7435, subdivision (a).

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers shall be served on the Department, the Commission, respondent, and complainant.

DATED: June 22, 2007

TAMIZA HOCKENHULL

PATRICK ADAMS

CAROL FREEMAN

LINDA NG

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PROPOSED DECISION

Administrative Law Judge Caroline L. Hunt heard this matter on behalf of the Fair Employment and Housing Commission from November 1 to 3, and on December 8, 2006, in San Diego, California.

Annmarie Billotti, Senior Staff Counsel, represented the Department of Fair Employment and Housing. Benjamin A. Johnson, Esq., of Quadras & Johnson, LLP, represented respondent Sasco Electric, Inc. Complainant Zibute Scherl and respondent's legal affairs manager, John Stevenson, attended throughout the hearing.

After receipt of the hearing transcripts, and the parties' timely filed post-hearing opening and reply briefs, the last of which was received by the Commission on February 23, 2007, the matter was deemed submitted.

After consideration of the entire record, the administrative law judge makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On February 17, 2005, Zibute Radziute Scherl (complainant) filed a written, verified complaint with the Department of Fair Employment and Housing (DFEH) against Sasco Electric, Inc. The complaint alleged that, on February 27, 2004, Sasco Electric, Inc.

terminated complainant's employment because of her pregnancy and discriminated against her on the basis of her sex, in violation of the Fair Employment and Housing Act, Government Code section 12900, et seq. (the Act or FEHA).

2. On February 10, 2006, complainant filed an amended complaint correcting her job title and rate of pay, but otherwise re-alleging the same charge as the original complaint.

3. The DFEH is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On February 16, 2006, Suzanne M. Ambrose, in her official capacity as Director of the DFEH, issued an accusation against Sasco Electric, a California corporation (Sasco or respondent). In the accusation, the DFEH alleged that Sasco barred complainant from her employment because of her pregnancy and paid her less than male crew members, thereby discriminating against complainant because of her sex (female) in violation of Government Code section 12940, subdivision (a). In its accusation, the DFEH further alleged that respondent failed to take all reasonable steps to prevent discrimination from occurring, in violation of Government Code section 12940, subdivision (k).

4. At all times relevant, Sasco was engaged in the business of providing electrical subcontracting and consulting on commercial construction projects throughout California. Larry Smead was Sasco's chairman, and Jerry Jordan, who had worked at Sasco for over 17 years, served as the company's executive director. Sasco maintained its administration and personnel office at 12900 Alondra Boulevard, Cerritos, California. Sasco is an "employer," within the meaning of Government Code sections 12926, subdivision (d), and 12940, subdivisions (a) and (k).

5. At all times relevant, Sasco owned and operated a 70 foot-long yacht, El Navegante. Since January 1987, Sasco had employed David McIntyre as captain of El Navegante. Captain McIntyre was a Sasco management employee, with authority to hire and fire.

6. Each year, Sasco invited its clients, customers and some employees, and at times their spouses, to go on fishing trips in Mexico on El Navegante during the fishing season, from late April to July. Sasco's guests generally took airline flights to Mexico to meet the vessel and crew in La Paz, for fishing excursions lasting two to three days. They fished between 25 to 50 miles off the coast. The furthest they had ever gone offshore was 100 miles. The fishing trips included at least one night either anchoring in a cove or at sea.

7. Sasco also used El Navegante during the December holiday season, as part of the Christmas Boat Lights Parade, in Newport Beach, California.

8. Sasco experienced a downturn in demand for its electrical subcontracting services related to a decline in construction in the latter part of 2002 and early 2003. The company began instituting overhead cuts and layoffs, continuing into 2003.

9. Jerry Jordan was the admiral of El Navegante, to whom Captain McIntyre reported. As the person in charge of the boat's financial operations, each December, Jordan prepared the boat's budget, finalizing it in January. In neither 2002 nor 2003, did Jordan inform McIntyre of any projected or actual reduction in El Navegante's operations budget.

10. In about January 2003, Sasco purchased a second boat, a 26 foot fishing vessel, the Angler. Thomas Scherl was hired to run the Angler and be relief operator or "second captain" for Captain McIntyre on El Navegante.

11. On January 28, 2003, Captain McIntyre hired complainant¹ as a deck hand, at an initial salary of \$28,000 per year.

12. At the time of her hire by Sasco, complainant was an experienced sport fishing crew member. Since February 2001, she had worked on the Cortez, a 60 foot fishing vessel, under the command of Captain James Hughes. Complainant was initially hired on the Cortez as a deckhand—Hughes later promoted her to second captain. In May 2002, complainant had been issued her "U.S. Coast Guard license," certifying her as a U.S. Merchant Marine Officer. To qualify for the Coast Guard license, complainant had completed at least 720 days at sea, 80 hours of classroom training, and had passed a written examination administered by the Coast Guard.

13. Complainant's love of boats began as a child, when she was a Sea Scout. Starting at age 15, she worked for a water taxi service in Baltimore Harbor, then for the Ocean Institute on board historic boats, as well as on a three-masted schooner, Clipper City. Prior to joining Captain Hughes' crew on the Cortez in 2001, complainant majored in Ocean Studies at the Maine Maritime Academy. Complainant considered boating to be "her world."

14. For the 2003 fishing season, Sasco sent both El Navegante and the Angler down to Mexico. Captain McIntyre, Thomas Scherl, complainant and another deckhand, David Haas, crewed for Sasco that season. Complainant's duties as a deckhand included tying and untying the boat, dropping and lifting the anchor, and taking shifts on "watch," at times "running" the boat when Captain McIntyre was sleeping. All crew members on El Navegante also shared daily cleaning and cooking tasks on the boat, and helped the guests with their fishing. Sasco's boat guests, most of them fishing novices, were assisted by crew members, who prepared bait for the guests and "gaffed" (used a long pole to hook) the fish if necessary, after they were caught.

15. During the 2003 Mexico trip, Captain McIntyre taught complainant how to use the steering station at El Navegante's stern to maneuver the vessel.

16. When back in California, El Navegante and the Angler docked in San Diego or Newport Beach. Sasco employed Captain McIntyre's wife, Jane McIntyre, to work with the

¹ Complainant was known at the time as Zibute (or Zib) Radzius, also written as Radžiūtė.

crew doing cleaning, painting and general maintenance on the vessels while they were docked in California.

17. In mid-summer of 2003, it became apparent that Captain McIntyre and second captain Thomas Scherl did not work together well. By mutual decision, on July 6, 2003, Thomas Scherl left his employment with Sasco.

18. In the fall of 2003, Captain McIntyre began grooming complainant for promotion to the second captain position. Effective September 23, 2003, Sasco re-classified complainant's position to "assistant captain in training," and her pay was increased by \$200 per month, to \$30,400 annually.

19. In November 2003, complainant and Thomas Scherl were married.

20. In December 2003, while El Navegante was in Newport Beach for the Christmas Lights Parade, Captain McIntyre offered to train complainant in "docking" El Navegante, i.e. maneuvering the vessel in or out of the dock. Despite their trying to set up a mutually convenient time on three different dates, due to problems with scheduling, the training did not take place.

21. Toward the end of the Christmas Lights Parade in 2003, complainant met Jerry Jordan, Sasco's executive director. Jordan congratulated complainant on her recent marriage, telling her, "Whatever you do, don't get pregnant."

22. In December 2003, Timothy Best, who had previously worked for Point Loma Sport Fishing as a second operator, worked for Sasco on a cash basis during the Christmas Boat Lights Parade. On January 1, 2004, Sasco placed Timothy Best on the payroll as a deckhand on El Navegante, paying him \$33,600 per year.

23. On January 7, 2004, complainant was promoted to the position of assistant captain. Sasco gave her a pay raise of \$67 a month, to \$31,200 annually.

24. In 2004, neither Timothy Best nor complainant ever "docked" El Navegante, as Captain McIntyre was generally at the helm.

25. In January 2004, complainant suspected that she was pregnant. After an appointment with her primary care physician confirming her pregnancy, complainant confided the news to Jane McIntyre.

26. In early February 2004, complainant informed Captain McIntyre that she was pregnant. McIntyre was disappointed at the news. He thought her pregnancy would "impact" complainant's working on the boat. Complainant told McIntyre that she wanted to continue working as long as possible during her pregnancy. McIntyre considered complainant's attitude to be "cavalier" and asked that she get a medical clearance from her doctor.

27. The morning after complainant told him she was pregnant, Captain McIntyre telephoned Jerry Jordan to discuss the liability of having a pregnant crew member on the boat. Captain McIntyre also notified Michelle Ngo in Sasco's personnel office.

28. Captain McIntyre also mentioned complainant's pregnancy to deckhand Timothy Best, telling Best that he was worried about her safety and that "[complainant's] 'going to Mexico pregnant' was a 'big concern' for him.

29. On February 20, 2004, Michelle Ngo, of Sasco's personnel office, sent complainant a letter congratulating her on her pregnancy. Ngo's letter advised complainant that she was entitled to pregnancy disability leave of up to 88 working days. Although complainant had not asked for any time off relating to her pregnancy, Ngo sent her "Sasco's Response to FMLA,"² advising complainant, without further explanation, that she was ineligible for FMLA leave.

30. Michelle Ngo's February 20, 2004 letter also stated:

...[A]s your job/responsibilities [sic] entail rigorous work, SASCO will need certification from your Physician indicating your ability to perform your regular duties, without restrictions or limitations and without undue risk to yourself or to others.

Ngo enclosed a FMLA/CFRA "Certification of Health Care Provider" form, instructing complainant to "return the completed documents to me by March 15, 2004."

31. On February 23, 2004, Michelle Ngo sent complainant an email, with copies to Captain McIntyre and Jerry Jordan, providing information about California's Employment Development Department's (EDD's) Paid Family Leave Insurance Program. In her email, Ngo also wrote,

While the letter indicates you have until [March 15, 2004] to return the completed forms back to me, please do your best to expedite the process so that we may be able to determine your availability for the Mexico trip in April.

32. Around this time, Captain McIntyre told complainant to "hold off" asking her doctor for a medical release form, but instead, to "wait and see what happens."

33. On February 24, 2004, Jerry Jordan wrote an email to Captain McIntyre, with a copy to Michelle Ngo. The subject line was "Boat Budget 04," and the text read:

I sent the preliminary budget to [Sasco Chairman Larry Smead] for his input and approval he [sic] made some major changes that affect you and your crew.

² The federal Family and Medical Leave Act of 1993, 29 U.S.C. section 2601, et seq. (FMLA).

He will only allow you and one deckhand fulltime, while we are in Mexico and the month of Dec[ember] for the Christmas parade we can have a part time person that would be paid contract labor from the outside labor task code. This means Jane and the third person will come out of the budget at the end of Feb[ruary]. Sorry he cannot be swayed.

34. Prior to receiving the email from Jerry Jordan on February 24, 2004, Captain McIntyre had no knowledge of any contemplated reduction in Sasco's boat operations budget for 2004.

35. Also on February 24, 2004, complainant had an appointment with her doctor, Kim Goodwin, M.D., of West Coast OB/GYN Associates, in San Diego, California. After examining complainant, Dr. Goodwin found complainant to be 10 weeks pregnant. Dr. Goodwin also determined that complainant was not incapacitated by her pregnancy and had no work restrictions. Complainant gave Dr. Goodwin the "Certification of Health Care Provider" form, as Michelle Ngo had requested. Dr. Goodwin kept the form to fill out.

36. On February 26, 2004, in a Sasco document entitled "Notice As To Change in Employment Relationship," Michelle Ngo signed a form giving notice of the termination of complainant's employment as a "layoff, effective 2/27/04." On February 27, 2004, Ngo sent the notice to complainant by overnight mail. That same date, February 27, 2004, Sasco prepared an "Employee Separation Notice" stating that complainant was laid off, effective that day. Michelle Ngo signed the notice on behalf of Jerry Jordan.

37. On February 27, 2004, Captain McIntyre approached complainant in the salon of El Navegante and sat her down at the table. He handed her a copy of the email he had received from Jerry Jordan. Complainant read the email, asking what it meant. Captain McIntyre replied that complainant should file for unemployment that afternoon, as he was laying her off. When complainant asked why she had been chosen for layoff, McIntyre did not respond directly, saying that she should not take this decision personally.

38. Complainant left El Navegante that afternoon, feeling shocked, betrayed and embarrassed by the abrupt termination of her employment. She felt betrayed because, throughout her employment on El Navegante, Captain McIntyre had frequently expressed his confidence in complainant's abilities and her potential, and had frequently expressed to her that he was glad to have her as part of his crew. Her embarrassment stemmed from her realization that, as a woman, she had just lost her job in a "man's world."

39. That day, and in the days that followed, complainant was so distressed and upset by the loss of her job that she could not stop crying.

40. Complainant's husband Thomas Scherl telephoned Captain McIntyre that same afternoon, February 27, 2004. He told McIntyre that complainant was so upset that she could not stop crying. Thomas Scherl became angry and accusatory, asking McIntyre, "It's because

she is pregnant, isn't it?" McIntyre did not respond to the accusation, telling Thomas Scherl that he was "out of line."

41. The following day, February 28, 2004, Captain McIntyre told deckhand Timothy Best that they had laid complainant off, because "[t]hat way we can't be sued." McIntyre also told Best that Jane McIntyre might need to stay home for a few weeks.

42. For about one week, from February 28 to about March 5, 2004, Jane McIntyre stayed off work. On her return to work the next week, Sasco changed her status from a payroll employee to an independent contractor. Jane McIntyre's duties, hours and rate of pay were unchanged. At some point not established in the record, her status was readjusted back to a payroll employee.

43. On or about March 3, 2004, Dr. Goodwin completed and mailed to complainant the "Certification of Health Care Provider" form that Sasco had provided. Because she had already been fired by Sasco, complainant did not send the form back to Michelle Ngo.

44. At the time her employment was terminated, complainant had been earning \$31,200 annually at Sasco, plus medical, dental and optical benefits and a 401(k) plan, where the company matched employees' monthly 13 percent contributions.

45. In order to continue her health care coverage, complainant incurred COBRA payments of \$3,780, which she borrowed from her in-laws, and paid an additional \$360 for health insurance coverage for herself and her daughter.

46. In an undated letter of recommendation prepared after the termination of complainant's employment, Captain McIntyre wrote:

To whom it may concern,

Zibute Radzius worked on the M.V. El Navegante for thirteen months during 2003 and 2004. She is the hardest working, responsible, boat savvy individual to work with me during my seventeen years on this vessel. She would be a valuable addition to any crew. I would be pleased to work with her again anytime.

Captain David R. McIntyre

47. Captain McIntyre considered complainant an excellent, hard-working employee and a "great person to have on the boat." At no time did Captain McIntyre tell complainant that performance problems played any role in the decision to terminate her employment.

48. In the first weeks after her employment was terminated, complainant was so upset that she did not leave her house. She felt as if she were "in a haze." She was afraid to approach her former boss at the Cortez, Captain James Hughes, fearing that he would look

down on her for getting pregnant and losing her job. Complainant felt that “the entire fleet” would look down on her as “the girl who got pregnant.”

49. Sometime in March 2004, complainant telephoned Captain McIntyre, asking him again why she had “been chosen for termination.” Captain McIntyre told complainant that, had she not been pregnant, he would not have terminated her employment. Captain McIntyre also asked complainant if she could “really think that he wanted to take [Timothy Best], a guy that he barely had time to train on the boat, down to Mexico...?” McIntyre also suggested that complainant could perhaps work on El Navegante on a “cash basis,” telling her that he would let her know if he could arrange that. He did not subsequently contact her again.

50. On about March 25, 2004, Captain McIntyre hired Calvin Cooper, who had no prior boat-handling experience, to work on El Navegante as a deck hand. Starting April 19, 2004, Sasco paid Cooper \$33,600 per annum.

51. In the latter half of April 2004, one day before El Navegante’s departure to Mexico, Timothy Best resigned from his job at Sasco for emergency family reasons.

52. Captain McIntyre hired a friend of Calvin Cooper, Trevor Dodge, who had no prior experience as a crew member, to work on El Navegante during the Mexico trip, in place of Timothy Best. Sasco paid Dodge on a cash basis as a contract worker, at a rate of pay not reflected in the record. Calvin Cooper was moved to payroll as an employee, with benefits.

53. In the weeks and months following her firing by Sasco, complainant was emotionally crushed. She felt as though her “life had ended ... it was just taken away.” She felt she had been deprived of her autonomy as an individual—her right to decide when during her pregnancy she would stop work and when she would return after the baby was born. She was unable to leave her house. She cried every day for over a month.

54. Complainant also experienced a sense of loss of trust in people close to her. She tried to push them away from her. Her relationship with her husband suffered. They fought. Their physical relationship became almost non-existent.

55. Complainant’s marriage also became strained because of the financial pressure from the loss of her income. This made daily life additionally stressful for complainant. She feared for her ability to provide for her baby. She and her husband Tom could not meet their monthly bills, and their home phone was disconnected. They borrowed from Tom’s parents to cover COBRA and, at times, the rent. Complainant was embarrassed to have to ask for this financial help.

56. Complainant’s father-in-law Chuck Scherl, a licensed marriage and family therapist, observed and spoke with complainant on a regular basis after she lost her job. While complainant was, prior to her termination, an outgoing and vivacious person,

Chuck Scherl observed her after losing her job as “tearful, disappointed, angry, anxious, [and] afraid.”

57. Complainant also felt pressure to find any kind of work. She began looking for work about a month after losing her job, in late March 2004, when she went down to the harbor landings, asking about any available work. Although she felt embarrassed to face Captain Hughes, in June 2004, complainant asked him about possible work, but he did not have any crew member positions available.

58. Because there were no positions available as assistant or second captain, or even deckhands, in the San Diego area after she lost her job, complainant felt pressured to try and find another kind of work to bring in much-needed income. But she had worked on boats for 15 years as her chosen career, and it felt part of her identity.

59. On September 17, 2004, complainant’s and Thomas Scherl’s daughter, Baltia, was born by caesarian section, without complications. According to complainant’s medical provider, Kim Goodwin, M.D., from September 12, 2004 to November 12, 2004, complainant was disabled by her pregnancy and the birth of her child, and was unable to work for that eight-week period.

60. After the birth of her daughter, complainant efforts to look for work comprised of visits to the harbor to inquire about any available boat work, but her husband Tom Scherl discouraged her from taking the baby to the boat works. Looking after her new baby and lack of childcare also limited her job search in late 2004 and into 2005.

61. Neither Captain McIntyre nor anyone from Sasco ever contacted complainant to ask if she would like to return to work on El Navegante. In March 2005, the company hired Joe Achten, a male, as a “second captain” on El Navegante, at the rate of pay of \$3,200 per month, \$38,400 annually.

62. By September 2005, complainant was actively looking for work. Because she could not find an assistant captain or deckhand position, she pursued other possibilities, including looking into teaching opportunities and submitting an application to work in a coffee shop.

63. In about October 2005, complainant began working for Captain Hughes on the Cortez on a part-time basis. Complainant earned \$150 or \$125 per day on fishing trips, depending on the size of the crew, and \$8 to \$10 an hour for maintenance or related tasks, without benefits. From October to December 2005, complainant worked 7.5 days on the Cortez at sea and 50 hours doing maintenance, earning \$1,370. In the first three months of 2006, complainant worked 100 hours doing maintenance, earning \$1,000. After April 1, 2006, she worked 21 days at sea on the Cortez and 80 hours doing maintenance, earning an additional \$3,360 to the date of hearing.

64. Once complainant began working again on the Cortez in October 2005, her emotional state improved, as she began to reestablish her career and professional goals.

65. In late March 2006, complainant's husband, Thomas Scherl, became captain of the Tracer, a sport fishing vessel owned by SFT Sportfishing, Inc., running fishing trips out of San Diego. In addition to her work on the Cortez, complainant crewed on the Tracer as the second captain, earning \$125 per day at sea, and \$12 an hour for maintenance, without benefits. In her first month, March 2006, complainant earned \$156.59. In total, complainant worked 162 hours as a second captain and 188 hours on maintenance, earning \$3,944 from SFT Sportfishing, Inc. from March 2006 to the date of hearing.

Sasco's Written Policy

66. Sasco had a written policy entitled "Equal Employment Opportunity and Affirmative Action Plan" (EEO policy) dated January 1, 2001 to December 31, 2001.³

67. Sasco's EEO policy included a maternity leave provision, which stated in pertinent part, "[a] woman is allowed to work as long as she and her doctor agree that her health will not be endangered."

68. At no time during her employment at Sasco was complainant shown a copy of Sasco's EEO policy or informed of its provisions.

69. Neither Jerry Jordan, Sasco's executive director, nor Captain McIntyre, complainant's direct supervisor, was aware whether Sasco had a policy prohibiting pregnancy discrimination. Neither Jordan nor McIntyre had ever attended any training about the prevention of pregnancy discrimination. Captain McIntyre was not aware of and had never seen Sasco's EEO policy.

Medical Evidence

70. During the course of discovery after the accusation was issued in this case, the DFEH produced the "Certification of Health Care Provider" form that Dr. Goodwin had filled out in early March 2004. On the form, Dr. Goodwin certified that complainant was "not incapacitated at this time and has no current work restrictions." In response to the printed question on the form asking about "the likely duration and frequency of episodes of incapacity," Dr. Goodwin handwrote, "Patient is not presently incapacitated however after [May 10, 2004] patient should not continue in harm's way of being hit or knocked over. She should also not be out to sea for several days at a time."

71. The DFEH proffered Dr. Goodwin's testimony at hearing by affidavit, pursuant to California Code of Regulations, title 2, section 7428, providing respondent written notice of its intention to do so prior to hearing. After respondent exercised its right to

³ The policy referred in its introduction to the "Fair Employment Practices [sic] and Housing Act."

cross-examination (Cal. Code Regs., tit. 2, § 7428, subd. (a)), by mutual agreement, counsel took Dr. Goodwin's deposition by telephone, on October 26, 2006. The admissibility of Dr. Goodwin's deposition testimony was contested at hearing, and is discussed below.

DETERMINATION OF ISSUES

Liability

The DFEH alleges that respondent Sasco discriminated against complainant based on her sex by terminating her employment because of her pregnancy, and by paying her less than the male crew members, in violation of Government Code section 12940, subdivision (a). The DFEH further charges that respondent Sasco failed to take all reasonable steps to prevent discrimination from occurring, in violation of Government Code section 12940, subdivision (k). Respondent disputes each of these charges.

A. Sex Discrimination Based on Pregnancy

The DFEH alleges that respondent discriminated against complainant based on her sex, in violation of Government Code section 12940, subdivision (a), by terminating complainant's employment because she was pregnant. Respondent offers in its defense that it acted lawfully in selecting complainant for layoff as part of a company-wide reduction in force, that it was further justified because of concerns about complainant's safety during her pregnancy, and finally, respondent raises a bona fide occupational qualification (BFOQ) defense.

Discrimination by an employer because of pregnancy constitutes discrimination because of sex, under Government Code sections 12926, subdivision (p), and 12940, subdivision (a). (Gov. Code, § 12926, subd. (p); § 12940, subd. (a); Cal. Code Regs., tit. 2, § 7291.5; *Spaziano v. Lucky Stores, Inc.* (1999) 69 Cal.App.4th 106, 110; *Badih v. Myers* (1995) 36 Cal.App.4th 1289, 1296.) Discrimination of this kind is established if a preponderance of the evidence demonstrates a causal connection between complainant's pregnancy and an adverse action taken against her. It need not be shown that complainant's pregnancy was the sole or even the dominant cause of her adverse treatment. Intentional discrimination is established if complainant's pregnancy was at least one of the factors that influenced respondent to act against her. (*Dept. Fair Empl. & Hous. v. California State University, Hayward* (Nov. 9, 1988) No. 88-18, FEHC Precedential Decs. 1988-89, CEB 6 at p. 17 [1988 WL 242650 (Cal.F.E.H.C.)]; *Dept. Fair Empl. & Hous. v. Church's Fried Chicken, Inc.* (Aug. 16, 1990) No. 90-11, FEHC Precedential Decs. 1990-91, CEB 5 at p. 10 [1990 WL 312878 (Cal.F.E.H.C.)].)

The DFEH established both direct and circumstantial evidence to support its allegation that complainant's pregnancy was a causal factor in Sasco's decision to terminate her employment. Complainant, a credible and compelling witness, testified that Captain

McIntyre told her in about March 2004 that she would not have lost her job if she had not been pregnant. Crew member Timothy Best credibly testified that Captain McIntyre had said that he doubted complainant could come to Mexico on El Navegante because she was pregnant. And Jane McIntyre testified that her husband told her that complainant's pregnancy was one of the reasons complainant was let go.

The DFEH also showed that respondent Sasco's decision-makers harbored negative stereotypes about pregnant crew members. For example, in December 2003, when he learnt of complainant's recent marriage, Jerry Jordan told her, "Whatever you do, don't get pregnant." Moreover, Captain McIntyre judged complainant "cavalier" in wanting to continue working during her pregnancy.

Further, the timing in this case is significant. In late February 2004, the day after learning that complainant was pregnant, Captain McIntyre discussed with Jordan the issue of the company's liability if complainant remained a crew member while pregnant. Within days, Jordan generated the layoff email. On February 27, 2004, Captain McIntyre executed the layoff plan, terminating complainant's employment and instructing his wife to stay home for a week. On February 28, 2004, Captain McIntyre told deckhand Timothy Best that Sasco had laid complainant off, because "[t]hat way we can't be sued."

Based on this evidence, the DFEH has established there was a causal relationship between complainant's pregnancy and Sasco's decision to terminate her employment. Accordingly, the DFEH established that Sasco discriminated against complainant by terminating her employment because she was pregnant. Respondent Sasco will be held liable for violating the Act unless it can prove an appropriate affirmative defense. (Cal. Code Regs., tit. 2, § 7286.7.)

1. Reduction-in-Force Defense

Respondent first asserts that complainant was laid-off as part of a legitimate reduction in force, due to the 2002-2003 down turn in the construction industry, arguing that complainant's pregnancy was "coincidental" to her layoff. The DFEH disputes both contentions, arguing that respondent's various and shifting rationales for the termination of complainant's employment are "strongly indicative of pretext" for Sasco's unlawful discrimination based on pregnancy.

In support of its contention that complainant was laid off, respondent relies on the testimony of Jerry Jordan, who was responsible for the boat operations budget. Notwithstanding Jordan's testimony that he needed to reduce the boat operations budget in early 2004, the record established that Sasco augmented its fleet in early 2003 by acquiring an additional boat, the Angler, and about the same time, Sasco hired both Thomas Scherl and complainant. Thereafter, in January 2004, Sasco added Timothy Best to the payroll. This evidence does not support Jordan's testimony about a need to reduce Sasco's boat operations budget in February 2004.

Jerry Jordan's layoff email, dated February 24, 2004, was the only documentation presented at hearing to support a need for layoffs due to a reduction in the boat operations budget. The evidence established that Jordan generated the email within days after Captain McIntyre told him that complainant was pregnant. This proximity in time is suspicious, especially in light of Captain McIntyre's admission to Timothy Best, the day after complainant was let go, that she was laid off in order to avoid a lawsuit. Thus, this decision turns to the credibility of Jerry Jordan's testimony in this case.

In assessing the credibility of a witness' testimony at hearing, it is appropriate to consider the manner and character of the testimony, as well as the party's demeanor. (Evid. Code, § 780; *Kilstrom v. Bronnenberg* (1952) 110 Cal.App.2d 62, "[t]he weight and credibility of testimony is affected, not only by other directly contradictory evidence, but also by pertinent circumstances and witnesses' demeanor.") In this case, several examples illustrating inherent contradictions in the record underscore the problems with the credibility of Jerry Jordan's testimony at hearing. For example, Jordan testified that he was not aware of when, in relation to his generating the layoff email, he learned that complainant was pregnant. Jordan further specifically testified that he had never discussed with Captain McIntyre the liability of complainant's continuing to work for Sasco while pregnant. Jordan's denial, however, was contradicted by Captain McIntyre, who forthrightly testified that they discussed complainant's pregnancy and Sasco's potential liability, before Jordan's February 24, 2004 layoff email. In another example, Jordan testified that he had previously informed Captain McIntyre of the "need to cut people." But Captain McIntyre contradicted this, testifying that he had known nothing about any projected layoffs prior to the February 24, 2004 email. Also, Jordan testified that he left all hiring and firing decisions to Captain McIntyre ("I don't tell him who he can hire or fire.") His layoff email, however, specifically instructed Captain McIntyre to layoff Jane McIntyre, giving rise to an inference that this was to establish "cover" for the decision to terminate complainant's employment.⁴ In fact, the evidence strongly indicated that the Jane McIntyre's layoff was an artifice, as the record showed that Sasco simply removed her name from the payroll, only to continue to pay her as an independent contractor, at the same rate, with the same duties and hours, and then later, returned her to the payroll.

Thus, this decision does not credit Jerry Jordan's testimony that the decision to layoff complainant was a legitimate reduction in force, unrelated to her pregnancy.

Even assuming, *arguendo*, that Sasco had established a legitimate need to lay off a crew member, its argument that Timothy Best was the better choice over complainant because of Best's "superior" ability to drive and dock El Navegante is not persuasive. The evidence established that Captain McIntyre had not permitted either Timothy Best or

⁴ Jordan's further instruction in the email to layoff the "third person" was, this decision finds, deliberately ambiguous, and coded to give Captain McIntyre the opportunity to "select" complainant for layoff. Further, McIntyre's decision that complainant was the "third person" belies credulity, as the evidence was uncontroverted that she was the more senior-serving and higher-ranked crew member, compared to Timothy Best, who had only recently been hired as a deckhand.

complainant to dock El Navegante, nor had he permitted Best to run the boat other than one hour on auto pilot. The evidence also showed that complainant had not only driven the boat on night watch, but had also been taught how to steer the vessel from the stern. Moreover, complainant was by all accounts, including McIntyre's, an exceptionally able assistant captain.

It is also significant that respondent failed to recall complainant back to work when hiring another deckhand in mid-April 2004, instead, hiring the inexperienced Calvin Cooper. That Sasco again failed to call complainant back to work when Timothy Best resigned just before El Navegante left for Mexico in 2004 further indicates that budgetary concerns were not the reason complainant was no longer employed at Sasco.

Based on this record, respondent did not establish that its reason for terminating complainant's employment was due to a legitimate reduction in force.

2. Safety Defense

Respondent next argues that pregnancy qualifies as a disability under the Act,⁵ and that Sasco can therefore assert a safety defense.⁶ The DFEH counters that pregnancy is a distinct protected basis and not a disability under the Act. The DFEH is correct.

⁵ Sasco relies on the deposition testimony of Dr. Goodwin as the basis for its safety defense. At hearing, the DFEH objected to admissibility of the deposition transcript, and the matter was taken under submission.

This decision finds that Dr. Goodwin's deposition testimony is admissible as part of the hearing record based on the parties' pre-hearing agreement to permit the deposition in lieu of live testimony, after respondent's elected its right to cross-examination under the Commission's regulations. (Cal. Code Regs., tit. 2, § 7428, subd. (a).)

At her deposition, Dr. Goodwin testified to future medical restrictions that would be expected during the natural course of complainant's pregnancy. But none of these played any role in Sasco's decision to terminate complainant's employment, since Sasco did not learn of them until the deposition, after the accusation was issued in this case. Dr. Goodwin also testified that at the end of February 2004, complainant was not incapacitated by her pregnancy and had no medical restrictions whatsoever, thereby medically clearing complainant to continue working.

⁶ At hearing, respondent proffered a videotape as "illustrative evidence" of the duties of deckhands on El Navegante (Exhibit P). The DFEH objected to admission of the videotape, on the basis that respondent failed to lay a foundation, and that its probative value was outweighed by its prejudicial value under Evidence Code section 352. The matter was taken under submission.

In determining the admissibility of a proffered videotape, the Commission ascertains whether the videotape reasonably represents what it is alleged to portray and would assist or mislead the trier of fact in determining the facts of the case. (*DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1232; *Harmon v. San Joaquin L. & P. Corp* (1940) 37 Cal.App.2d 169, 174 [noting that factors in film and videos, such as "the elimination of unfavorable portions of a film" and the "angle from which a picture is taken...may tend to create misleading impressions"].)

This decision finds that the videotape in question was without a foundational basis establishing what it depicted or when it was made. Further, based on Captain McIntyre's testimony, significant sections of the videotape (Continued on next page)

Respondent asserts that the federal courts “treat pregnancy... as a...disability.” Respondent’s reliance on *Spivey v. Beverly Enterprises, Inc.* (11th Cir. 1999) 196 F.3d 1309, for this proposition is misplaced. *Spivey* concerned a pregnant nurse’s assistant who, after her doctor imposed a medical restriction that she not lift more than 25 pounds, was terminated. The court upheld the lower court’s grant of summary judgment, finding that the employer did not violate Title VII, as amended by the Pregnancy Discrimination Act, 24 U.S.C. § 2000e(k), by treating employees with on-the-job injuries differently to pregnant employees. Thus, *Spivey* is inapposite.

A number of federal courts have held that pregnant women cannot assert the protections accorded persons with disabilities. (See, e.g., *Johnson v. A.P. Products, Ltd.* (S.D.N.Y. 1996) 934 F.Supp. 625, 626; *Gudenkauf v. Stauffer Communications, Inc.* (D.Kan. 1996) 922 F.Supp. 465, 473 *Villarreal v. J.E. Merit Constructors, Inc.*, 895 F.Supp. 149, 152 (S.D.Tex. 1995); *Tsetseranos v. Tech Prototype, Inc.*, (D.N.H. 1995) 893 F.Supp. 109, 119. And the federal regulations implementing the Americans with Disabilities Act, 29 C.F.R. § 1630.2(h), state that “conditions, such as pregnancy, that are not the result of a physiological disorder are not impairments.” (29 C.F.R. § 1630.2(h).) Others federal courts, however, have recognized the distinction “between a normal, uncomplicated pregnancy and a complication arising out of the pregnancy.” (*Cerrato v. Durham* (1996) 941 F.Supp. 388, 392; *Patterson v. Xerox Corp.* (N.D.Ill. 1995) 901 F.Supp. 274.)

Under the FEHA, pregnancy *per se* is not a disability. (Gov. Code, §§ 12926, subd. (g), and 12940, subd. (a).) The FEHA contemplates, however, that there are circumstances where complications arising from pregnancy, childbirth or related conditions could come under the protected basis of disability. On this record, however, complainant’s condition did not include such circumstances.

The Commission has defined the term “disabled by pregnancy” in its regulations. California Code of Regulations, title 2, section 7291.2, subdivision (g), provides:

A woman is “disabled by pregnancy” if, in the opinion of her health care provider, she is unable because of pregnancy to work at all or is unable to perform any one or more of the essential functions of her job or to perform these functions without undue risk to herself, the successful completion of her pregnancy, or to other persons.

⁶ (Continued)
were not representative of his fishing trips, including the 1000 pound fish depicted on the video, the “fight chair,” and the “man overboard.” In summary, the videotape was more in the nature of a fishing highlights reel, edited for heightened drama and fishing thrills, rather than demonstrating the reality of being a crew member on *El Navegante*. Accordingly, based on the lack of authentication (Evid. Code, § 250), and lack of probative value (Evid. Code, §§ 210, 352), admission is denied.

Similarly, photographs proffered by respondent that had been downloaded from the internet, depicting fishing “hot shots” off Lizard Island, Australia (Exhibit Q), lack authentication and are insufficiently probative to warrant admission into evidence.

As argued correctly by DFEH, and conceded by Sasco, when Sasco terminated complainant's employment in February 2004, complainant was not "disabled by pregnancy." Complainant's doctor's testimony established that complainant was not, at ten weeks, incapacitated by her pregnancy and was under no work restrictions whatsoever.⁷ While Captain McIntyre asked for a medical clearance from complainant's doctor,⁸ the evidence established that Sasco did not wait for Dr. Goodwin's medical clearance before terminating complainant's employment.

Accordingly, having failed to prove that complainant was disabled by pregnancy at the time of her termination, respondent failed to establish a safety defense.

3. Bona Fide Occupational Qualification Defense

Sasco next argues that a policy that excludes pregnant crewmembers from employment constitutes a BFOQ. The DFEH disputes this, asserting that a BFOQ defense is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex" that cannot be met by respondent in this case.

Under the Commission's regulations, a BFOQ defense may be established:

Where an employer or other covered entity has a practice which on its face excludes an entire group of individuals on a basis enumerated in the Act (e.g.,

⁷ For the 8-week period that complainant's doctor certified that complainant was disabled by her pregnancy and the birth of her child, from October to November 2004, the DFEH recognizes that she was unable to work during that time, and seeks no back pay for that period on complainant's behalf.

⁸ Captain McIntyre testified that he made his request that complainant obtain a medical clearance based on his judgment that complainant was "cavalier" about her desire to continue working, rather than any pregnancy-related health problems complainant was experiencing. And there was no evidence that complainant's pregnancy was ever considered high risk or that complainant had any related medical condition, within the meaning of the Act. The evidence established that, to the contrary, complainant experienced a normal pregnancy.

While an employer may ask for medical certification of a pregnant employee where there are medically-based issues requiring the input of the health care provider, the Commission's regulations circumscribe when employers can demand such medical certifications. The regulations state that an employer may request a certification where an employee seeks pregnancy disability leave or transfer. (Cal. Code Regs., tit. 2, § 7291.10, subd. (b).) "Certification" means a written communication from the health care provider of the employee that either the employee is disabled due to pregnancy or that it is medically advisable for the employee to be transferred to a less strenuous or hazardous position or to less strenuous or hazardous duties. (Cal. Code Regs., tit. 2, § 7291.2, subd. (d).)

The record in this case was clear that complainant never requested that she be placed on leave or to be transferred to another position because of her pregnancy. Thus, the request for certification here was unwarranted. Moreover, Captain McIntyre testified that he had never before requested a medical certification from any male employee, or from any non-pregnant crew member. Thus, the evidence established complainant was treated differently due to her pregnancy, no matter how solicitous or well-meaning McIntyre considered himself.

all women or all individuals with lower back defects), the employer or other covered entity must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined.

(Calif. Code Regs., tit. 2, § 7286.7, subdivision (a).)

In examining asserted BFOQ defenses, the Commission has noted, “We take seriously our obligation to construe the BFOQ defense narrowly” not to permit “illicit BFOQ’s, particularly ones resting on sexist constructs.” *Dept. Fair Empl. & Hous. v. Hoag Memorial Hospital Presbyterian* (June 14, 1985) No. 85-10, FEHC Precedential Decs. 1984-85, CEB 14 [1985 WL 62889 (Cal.F.E.H.C.)], disapproved on other grounds in *Kelly v. Methodist Hospital of Southern California* (2000) 22 Cal.4th 1108; see also *Johnson Controls, Inc. v. Fair Empl. & Hous. Comm.* (1990) 218 Cal.App.3rd 517, 521.)

Respondent presented no factual basis for a BFOQ defense, by establishing that it had in fact adopted a practice excluding all pregnant employees from its workforce. Moreover, as the DFEH persuasively argues, Sasco failed to prove that its principal business operations, electrical contracting, would be undermined by accommodating a pregnant employee’s job responsibilities.

Thus, based on the foregoing, respondent cannot avail itself of the BFOQ defense.

Accordingly, respondent having not proven any defense, the DFEH has established that complainant’s pregnancy was, on the facts of this case, the key factor in Sasco’s termination decision, and that Sasco thereby violated Government Code section 12940, subdivision (a).

B. Sex Discrimination--Disparate Wages

In its accusation, the DFEH asserts that Sasco also discriminated against complainant on the basis of her sex by failing to pay her on a basis commensurate with Sasco’s male deckhands. Respondent disputes this contention.

The evidence established that Sasco paid complainant her highest rate, \$31,200 annually, after her promotion to assistant captain. Timothy Best, as a newly hired deckhand in January 2004, was paid \$2,400 per annum more than complainant. Deckhand Calvin Cooper who, like Trevor Dodge lacked boating or deckhand experience, was paid \$2,400 per annum more than complainant. Joe Achten, hired as second captain in March 2005, was paid \$7,200 per annum more than complainant.

Respondent’s explanation that Cooper and Dodge were paid a higher rate because they were paid cash (rather than payroll with benefits) is not borne out by the evidence. Captain McIntyre testified that Cooper was placed on payroll in April 2004. Being on payroll at Sasco, as the evidence throughout this case showed, included benefits.

Captain McIntyre also testified that, while setting the rates of pay was “pretty loose,” assistant (second) captains were paid more than deckhands. Yet Best, Cooper and Dodge, all working for Sasco as deckhands, were each paid more than complainant, an experienced, licensed assistant captain. Based on this record, the preponderance of the evidence establishes that complainant’s sex as a female was a factor in Sasco’s paying her less than Sasco’s male crew members.

Accordingly, the DFEH established that Sasco violated Government Code section 12940, subdivision (a), by paying complainant less than male crew members on El Navegante.

C. Failure to Take All Reasonable Steps

The DFEH alleges that respondent violated Government Code section 12940, subdivision (k), by failing to take all reasonable steps necessary to prevent discrimination from occurring.

The record established that neither Sasco’s executive director, Jerry Jordan, nor complainant’s immediate supervisor, Captain McIntyre, knew whether Sasco had a policy prohibiting pregnancy discrimination. Neither Jordan nor McIntyre had ever attended any training about the prevention of pregnancy discrimination. Further, Captain McIntyre was not aware of and had never seen Sasco’s EEO policy.

Sasco’s written EEO policy included a section entitled “maternity leave,” providing that a pregnant employee could continue to work if “she and her doctor agree that her health will not be endangered.” Sasco’s failure to provide complainant with a copy of this policy does not, under the facts of this case, appear to be an oversight. After instructing complainant to provide a medical certification from her doctor by March 15, 2004, Sasco terminated her employment 17 days before the certification was due. Sasco impermissibly took advantage of the fact that complainant was unaware of her rights, not only under the FEHA, but under Sasco’s own maternity leave policy.

Accordingly, on this record, the DFEH established that respondent failed to take all reasonable steps necessary to prevent discrimination from occurring, and thereby violated Government Code section 12940, subdivision (k).

Remedy

Having established that respondent Sasco discriminated against complainant based on her sex in violation of the Act, the DFEH is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury she suffered as a result. The DFEH must demonstrate, where necessary, the nature and extent of the resultant injury, and respondent must demonstrate any bar or excuse it asserts to any part of these remedies. (Gov. Code, § 12970, subd. (a); Cal Code Regs., tit. 2, § 7286.9; *Donald Schriver, Inc. v. Fair Empl. &*

Hous. Com. (1986) 220 Cal.App.3d 396, 407; *Dept. Fair Empl. & Hous. v. Madera County Bd. of Supervisors* (Sep. 7, 1983) No. 83-22, FEHC Precedential Decs. 1982-83, CEB 20, pp. 33-34 [1983 WL 36471 (Cal.F.E.H.C.)].)

The DFEH seeks: an order that respondent (1) cease and desist discriminating against complainant and all other employees on the basis of sex and/or pregnancy, or any protected basis; (2) reinstate complainant to the position of assistant captain, earning the same rate of pay respondent currently pays to males who hold the position of assistant or second captain; (3) pay to complainant lost wages, lost benefits, and out-of-pocket expenses, plus interest thereon; (4) pay to complainant compensatory damages for emotional distress, plus interest thereon, (5) pay to the State of California an administrative fine; (6) develop, implement, disseminate, and post a written policy prohibiting pregnancy and sex discrimination in the workplace; (7) conduct sex and pregnancy discrimination prevention training; (8) post the Commission's notices; and (9) such other relief as the Commission deems just and proper.

A. Make-Whole Relief

1. Back Pay

The DFEH seeks an award of back pay to compensate complainant for her lost wages from the date of her firing through the date of the hearing in this case. The DFEH argues that any award of back pay to complainant must recompense complainant at the higher rate Sasco paid its male deckhands, and deducts from its calculation the eight weeks complainant was disabled by her pregnancy and her earnings offset of \$9,674, for a requested back pay award of \$90,756.78.

Complainant is entitled to receive back pay for the wages she otherwise could have expected to earn but for respondent's violation of the Act. (*Donald Schriver, Inc. v. Fair Empl. and Hous. Com.*, *supra*, 220 Cal.App.3d at p. 407.) Respondent bears the burden to prove any lack of mitigation of wages. (*Parker v. Twentieth Century-Fox Film Corporation* (1970) 3 Cal.3d 176, 181-182.)

Sasco argues that complainant was "medically barred" from working in May 2004, at 20 weeks pregnant, relying on Dr. Goodwin's deposition testimony. The record does not support this contention. Dr. Goodwin did not testify that complainant could no longer work for Sasco in any capacity when her pregnancy reached 20 weeks.⁹

⁹ Dr. Goodwin testified that complainant's pregnancy would be considered viable after 20 weeks, and she "didn't want [complainant] to be out on the boat away from medical care for a long period of time." Further, Dr. Goodwin testified that she did not want complainant to be "struck in the abdomen by something weighing 60 to 100 pounds." These potential future medical restrictions did not preclude complainant from all types of work at Sasco after 20 weeks in her pregnancy. Moreover, the FEHA has in place specific protections for pregnant employees and mandates on their employers, involving the right to transfer and reasonable accommodation. (Gov. Code, §§ 12945, 12945.1 and 12945.2; Cal. Code Regs., tit. 2, §§ 7291.2, and 7297.0, et seq.) These were not in issue in this case, as respondent fired complainant without giving her the opportunity to ever ask for accommodation, transfer or leave due to her pregnancy.

Respondent also argues that complainant failed adequately to mitigate her wage loss after the birth of her baby and that she ceased looking for work once she was working for both SFT Sportfishing and on the Cortez. This decision agrees, to the extent that respondent established at hearing that complainant's mitigation efforts after the birth of her daughter Baltia were limited. Respondent showed that complainant's efforts to find work were hampered by the demands of looking after a new baby, her lack of childcare, and her husband's stated disapproval of her taking the baby to the boatyard.

Based on the evidence at hearing, this decision finds that complainant's back pay award is appropriately calculated from February 28, 2004 until September 17, 2004, and from September 1, 2005 to April 1, 2006, a period of 13 months and 20 days, less any earnings accrued within that time period. (Cal. Code Regs., tit. 2, § 7286.9, subd. (a)(1).) Also, this decision finds it appropriate to award complainant's back pay at the rate of \$2,800 per month (\$31,600 annually), which reflects the higher rate Sasco paid both Timothy Best and Calvin Cooper in 2004. The award at this higher rate effectuates the remedial purposes of the FEHA, recognizing that the DFEH proved that Sasco discriminated against complainant by paying her less as a female, in violation of Government Code section 12940, subdivision (a).

Accordingly, this decision awards the sum of \$35,704.79 as back pay (13 months, 20 days times the monthly rate of \$2,800, i.e., \$38,131.50, less \$2,426.79 in accrued earnings). This amount shall be awarded to complainant, plus 10 percent interest thereon from the date said earnings would have accrued, compounded annually, until paid.

2. Out of Pocket Damages

The DFEH seeks an award of complainant's COBRA premiums and health insurance payments in the amount of \$4,140, incurred by complainant after the termination of her employment.

Complainant credibly testified that her COBRA payments totaled \$3,780. Complainant also incurred expenses of \$360 for health insurance coverage once her daughter Baltia was born.

This decision finds that complainant is entitled to these out of pocket damages, in the sum of \$4,140, to compensate for the health care coverage costs complainant incurred because of the unlawful termination of her employment. This amount will be awarded to complainant, plus 10 percent interest thereon from the effective date of the decision, compounded annually, until paid.

3. Compensatory Damages for Emotional Distress

The DFEH asks for \$100,000 in damages to compensate complainant for her emotional distress resulting from respondent's discriminatory conduct.

The Commission has the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, \$150,000 per aggrieved person per respondent. (Gov. Code, § 12970, subd. (a)(3).) In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, § 12970, subd. (b); *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (Mar. 10, 1988) No. 88-05, FEHC Precedential Decs. 1988-89, CEB 4, pp. 8-10 [1988 WL 242635 (Cal.F.E.H.C.)].)

At hearing, complainant credibly and convincingly testified that she experienced “pure shock, betrayal, [and] embarrassment” when Captain McIntyre terminated her employment. The record established that in the days following losing her job, complainant was so upset that she cried continuously. For over a month, she cried every day, and was unable to leave her house. She experienced depression and loss, as if her life had been taken away from her. She alternated between anger and self-doubt. Her emotional state manifested in physical symptoms, including daily headaches, nausea and sleeplessness, for at least the first two months after complainant was fired. Complainant also credibly testified to a continuing loss of trust in those around her, as a result of the termination of her employment. She felt that Captain McIntyre had betrayed her. Before she was pregnant, he had often told her that he believed in her and wanted her to be part of his crew. Complainant also testified to her continuing sense of embarrassment, having lost her job because she was pregnant, in a “man’s world.” Moreover, as complainant felt that boating was part of her identity, she testified that she felt that Sasco had taken her world away from her.

The financial stress placed on the family by her termination added to complainant’s emotional distress. Her relationship with her husband Thomas Scherl suffered. They got into arguments and lost much of their physical intimacy. Because of the loss of her paycheck, they could not make monthly payments, their phone was disconnected, and they had to borrow money for health insurance coverage and rent. The record also showed that complainant was fearful for her unborn baby’s welfare, because she did not have the financial resources to provide adequately for her family.

Thomas Scherl credibly corroborated complainant’s testimony about her emotional state after losing her job. He testified that complainant was “crushed” and embarrassed. She was reluctant to face her boating colleagues, thinking they would “look down” on her.

Complainant’s father-in-law, Chuck Scherl, also corroborated complainant’s account of the amount of emotional pain she experienced. He testified that he observed complainant,

formerly outgoing, fun-loving and vivacious, as “tearful, disappointed, angry, anxious, [and] afraid,” after losing her job.

After complainant’s baby was born, and after she started working regularly on the Cortez, the evidence established that complainant recovered a large portion of her former optimism and self-confidence.

Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (c), respondent will be ordered to pay to complainant \$85,000 in damages for her emotional distress.¹⁰ Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

B. Administrative Fine

The DFEH asks that the Commission award an administrative fine in the amount of \$50,000 against respondent, asserting that such a fine is warranted because Sasco’s termination of complainant’s employment, shortly after she disclosed to Captain McIntyre that she was pregnant, was intentional, egregious and in blatant disregard of complainant’s rights as a pregnant employee. The DFEH also argues that respondent “blatantly attempted to cover-up its discriminatory conduct.”

To warrant an award of an administrative fine, Government Code section 12970, subdivision (d), requires clear and convincing evidence of “oppression, fraud or malice.” (See *Dept. Fair Empl. & Hous. v. Wal-Mart* (June 7, 2005) No. 05-04-P [2005 WL 1703228, *13-14 (Cal.F.E.H.C.)].) “Oppression” is “despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.” “Malice” includes conduct intended to cause injury or despicable conduct, which is undertaken with a “willful and conscious disregard” of an employee’s rights. (Civ. Code, § 3294, subd. (c).) (*Id.*) The specific statutory factors to be considered by the Commission in determining whether to award an administrative fine, include, but are not limited to, the following: willful, intentional, or purposeful conduct; refusal to prevent or eliminate discrimination; conscious disregard for the rights of employees; commission of unlawful conduct; intimidation or harassment; conduct without just cause or excuse, or multiple violations of the Act. (Gov. Code, § 12970, subd. (d).) An administrative fine is payable to the state’s General Fund, and may not exceed, in combination with any award of compensatory damages for emotional distress, \$150,000 per complainant, per respondent. (Gov. Code, § 12970, subds. (a)(3); (c); and (d).)

Here, the DFEH proved, clearly and convincingly, that Sasco terminated complainant because she was pregnant, in violation of the FEHA. That Captain McIntyre may have been

¹⁰ The portion of complainant’s emotional distress attributable to complainant’s having a baby is expressly not included in a determination of complainant’s emotional distress damages in this case.

misguided by paternalism in no way excuses Sasco's deliberate flaunting of the FEHA's protections for pregnant employees. The record established that Sasco's conduct in terminating complainant's employment because she was pregnant, masquerading the firing to complainant and her co-workers as a layoff based on complainant's alleged inferior boating skills, then furthering the cover-up with a sham instruction to Jane McIntyre to stay off work for a week to make the layoff appear legitimate, was willful, malicious and oppressive discriminatory conduct, undertaken by Sasco in reckless indifference to complainant's rights as a pregnant employee.¹¹ In sum, the DFEH established, by clear and convincing evidence, that Sasco's discrimination against complainant based on her pregnancy warrants an administrative fine, necessary here to prevent recurrence and vindicate the purposes of the FEHA.

Accordingly, this proposed decision will order an administrative fine against respondent Sasco in the sum of \$25,000, payable to the state's General Fund, together with interest on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

C. Affirmative Relief

The DFEH's accusation asks that respondent be ordered to: implement policies against sex and pregnancy discrimination and circulate this policy to all employees; implement sex and pregnancy discrimination training for all employees; and display postings as forms of affirmative relief. The Act authorizes the Commission to order affirmative relief, including an order to cease and desist from any unlawful practice, and an order to take whatever other actions are necessary, in the Commission's judgment, to effectuate the purposes of the Act. (Gov. Code, § 12970, subds. (a) and (a)(5).)

Respondent will be ordered to: (1) cease and desist from denying any employee her rights to a discrimination-free work environment based on sex or pregnancy; (2) post a notice acknowledging its unlawful conduct toward complainant (Attachment A) along with a notice of employees' rights and obligations regarding unlawful discrimination under the Act (Attachment B); (3) disseminate its policy on sex and pregnancy discrimination prevention complying with California laws' requirements'; (4) develop a complaint procedure for violation of that policy; and (5) provide training on that policy and complaint procedure to all current supervisors within California.

¹¹ See, *Equal Employment Opportunity Comm. v. Wal-Mart Stores, Inc.* (9th Cir. 1998) 156 F.3d 989, 993 [Store managers' cover-up of their discriminatory conduct in refusing to hire a pregnant employee supports a finding of malice or reckless indifference civil rights, supporting punitive damages]; *Merriweather v. Family Dollar Stores of Indiana, Inc.* (7th Cir. 1996) 103 F.3d 576, 582 [reckless indifference can be inferred where employer "deliberately gave false reasons for firing [the plaintiff]"].)

ORDER

1. Respondent Sasco Electric, Inc., shall immediately cease and desist from denying any employee's right to a discrimination-free work environment based on sex or pregnancy under the Fair Employment and Housing Act.

2. Within 60 days of the effective date of this decision, respondent Sasco Electric, Inc., shall pay to complainant Zibute Radziute Scherl actual damages for lost back pay in the sum of \$35,704.79, together with interest thereon, at the rate of ten percent per year, compounded annually, from the date such wages would have accrued, until the date of payment.

3. Within 20 days of the effective date of this decision, respondent Sasco Electric, Inc. shall offer complainant Zibute Radziute Scherl reinstatement into her former position as an assistant captain or second captain on El Navegante, or a substantially comparable position which is acceptable to her. Zibute Radziute Scherl shall have 10 days from the date of respondent's offer to accept or reject the offer of reinstatement. Upon complainant's acceptance of the offer, Zibute Radziute Scherl shall be reinstated with all seniority, status and other terms of employment that would have accrued to her had she remained in respondent's employment, except that her rate of pay and benefits on reinstatement to her former position or the substantially comparable position shall be no less than the rate paid to male assistant captains and deckhands on payroll from 2004 to the effective date of this order.

4. Within 60 days of the effective date of this decision, respondent Sasco Electric, Inc. and the Department of Fair Employment and Housing shall attempt to reach agreement on the amount owed complainant Zibute Radziute Scherl as damages for lost wages accrued after the hearing and up to the date on which complainant accepts or refuses the offer of reinstatement made in compliance with section 3 of this Order. The parties shall, within 70 days of the effective date of this decision, report the agreed amount to the Commission for its approval, or report their failure to agree. Respondent Sasco Electric, Inc., shall pay the agreed amount within 10 days after the Commission approves it, and verify that the payment has been made by notifying the Commission in writing. Such amount shall include accrued interest, calculated at the rate of ten percent per year, running from the date the earnings accrued, and compounded annually, until the date of payment. If respondent and the Department do not reach agreement, or the Commission does not approve, this element of the damages award shall be returned for further hearing and the Commission reserves jurisdiction in this matter for that limited purpose.

5. Within 60 days of the effective date of this decision, respondent Sasco Electric, Inc. shall pay to complainant Zibute Radziute Scherl out of pocket damages in the sum of \$4,140, together with interest thereon, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

6. Within 60 days of the effective date of this decision, respondent Sasco Electric, Inc. shall pay to complainant Zibute Radziute Scherl compensatory damages for emotional distress in the sum of \$85,000, together with interest thereon, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

7. Within 60 days of the effective date of this decision, respondent Sasco Electric, Inc. shall pay to the state's General Fund an administrative fine in the sum of \$25,000, together with interest on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

8. Within 60 days of the effective date of this decision, respondent Sasco Electric, Inc. shall: develop and implement a written policy prohibiting sex and pregnancy discrimination in the workplace and disseminate that policy to all supervisors and employees in California; develop a complaint procedure for violation of that policy; and provide training on that policy and complaint procedure to all of his supervisors and employees within the State of California.

9. Within 10 days of the effective date of this decision, an authorized representative of respondent Sasco Electric, Inc., shall complete, sign where applicable, and post clear and legible copies of the notices conforming to Attachments A and B. These notices shall not be reduced in size, defaced, altered or covered by any material. Attachment A shall be posted for a period of 90 working days. Attachment B shall be posted permanently.

10. Within 100 days after the effective date of this decision, respondent Sasco Electric, Inc., shall in writing notify the Department of Fair Employment and Housing and the Fair Employment and Housing Commission of the nature of its compliance with sections two through nine of this Order.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

DATED: April 30, 2007

CAROLINE L. HUNT
Administrative Law Judge

ATTACHMENT A

SASCO ELECTRIC, INC.

NOTICE to EMPLOYEES AND APPLICANTS

Posted by Order of the FAIR EMPLOYMENT AND HOUSING COMMISSION, an agency of
the State of California

After a full hearing, the California Fair Employment and Housing Commission has found that Sasco Electric, Inc. violated the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) by terminating an employee's employment because she was pregnant, by paying her less than similarly situated male employees, and by failing to take all reasonable steps to prevent discrimination from occurring. (*Dept. Fair Empl. & Hous. v. Sasco Electric, Inc.* (2007) No. 07-____.)

As a result of the violation, the Commission has ordered Sasco Electric, Inc. to post this notice and to take the following actions:

1. Cease and desist from denying employees their rights to a discrimination-free environment based on sex and pregnancy under the Fair Employment and Housing Act.
2. Pay the employee lost wages, out of pocket expenses, and compensatory damages for emotional distress.
3. Reinstate the employee to her former position and at the rate of pay payable to male employees in the same position.
3. Pay the state's General Fund an administrative fine.
4. Provide training to its employees on sex and pregnancy discrimination prevention and rights to pregnancy disability leave under California law.
5. Post this notice for 90 days and permanently post a copy of Attachment B detailing employees' rights regarding sex and pregnancy discrimination.

Dated: _____

By: _____
[Authorized representative]
SASCO ELECTRIC, INC.

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS FROM THE DATE OF POSTING AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY

ATTACHMENT B

NOTICE TO ALL EMPLOYEES OF SASCO ELECTRIC, INC.

YOUR RIGHTS AND REMEDIES UNDER THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

YOU HAVE THE RIGHT TO BE FREE FROM UNLAWFUL DISCRIMINATION BASED ON SEX OR PREGNANCY. PREGNANT EMPLOYEES ALSO HAVE THE RIGHT TO BE GRANTED PREGNANCY DISABILITY LEAVE.

The California Fair Employment and Housing Act (FEHA), prohibits discrimination against an employee on a number of protected bases, including sex and pregnancy.

YOU HAVE THE RIGHT TO COMPLAIN ABOUT DISCRIMINATION AND GET RELIEF.

AS A PREGNANT EMPLOYEE, YOU ARE ALSO ENTITLED TO SUCH LEAVE FOR YOUR PREGNANCY AS YOUR MEDICAL PROVIDER DETERMINES, UP TO FOUR MONTHS.

Under the FEHA, if you are disabled by pregnancy, childbirth or related medical conditions, you are eligible to take a pregnancy disability leave (PDL). If you are affected by pregnancy or a related medical condition, you may also be eligible for reasonable accommodation in your job or to transfer to a less strenuous or hazardous position or to less strenuous or hazardous duties. Taking a pregnancy disability leave may impact certain of your benefits and your seniority date. If you want more information regarding your eligibility for a leave, the impact of the leave on your seniority and benefits, and our policy for other disabilities, please contact _____.

THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING investigates and prosecutes complaints of such retaliation in employment. If you think you have been retaliated against for asserting protected rights under the Fair Employment and Housing Act, you may file a complaint with the Department at:

Department of Fair Employment and Housing
1350 Front Street, Suite 3005
San Diego, CA 92101
(619) 645-2681 or (800) 884-1684

The Department will investigate your complaint. If the complaint has merit, the Department will attempt to resolve it. If no resolution is possible, the Department will prosecute the case with its own attorney before the Fair Employment and Housing Commission or in court. The Commission or court may order the discrimination stopped and can require your employer to

ATTACHMENT B

Page 2

reinstate you and to pay back wages, front pay and other out-of-pocket losses, damages for emotional injury, administrative fines, or punitive damages, and other appropriate relief.

DATED: _____ BY: _____
Authorized Agent of
Sasco Electric, Inc.

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN PERMANENTLY POSTED IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.